



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogutu v Undugu Society of Kenya (Cause 852 of 2018)  
[2023] KEELRC 2953 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2953 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 852 OF 2018  
B ONGAYA, J  
NOVEMBER 20, 2023**

**BETWEEN**

**CELINA ATIENO OGUTU ..... CLAIMANT**

**AND**

**UNDUGU SOCIETY OF KENYA ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim on 04.06.2018 and thereafter amended on 15.02.2019 through Ogembo & Associates Advocates. The claimant prayed for judgment against the respondent for:
  - a. Payment of Kshs.24,612,403 as particularized in paragraph 47.
  - b. General damages for defamation.
  - c. Damages on footing of aggravated or exemplary damages.
  - d. Unconditional withdrawal of libellous minutes.
  - e. Damages on account of unfair termination.
  - f. Costs of this suit.
  - g. Certificate of service.
  - h. Interest.
  - i. Any other relief that the court may deem appropriate to grant.
2. The respondent's memorandum of reply was filed on 09.07.2018 through Olando Okello & Lusenaka Advocates. The respondent prayed that the claim be dismissed with costs to the respondent.



3. The claimant's case was that she was employed by the respondent on 24.11.2010 as the executive director for a 3-year renewable contract effective 01.01.2011 and reporting to the board of directors of the respondent.
4. On 15.11.2013 the claimant was subjected to a performance appraisal covering the period 01.01.2011 to 31.12.2013 where the claimant exceeded expectations by scoring 82% and was on target and, on the strength of the results of the performance evaluation, and as per clause 2 of the contract of employment, the board of directors of the respondent approved the renewal of the contract of the claimant for a further period of 3 years effective from 01.01.2014. The three years lapsed on 31.12.2016.
5. It is the claimant's case that she performed extremely well within the period of the contract and delivered as required by her job description.
6. On 26.10.2016 the claimant's contract was once again renewed for a period of 3 years effective from 01.01.2017 to 31.12.2019 at a basic salary of Kshs.300,000.00.
7. A performance review was conducted and completed on 31.10.2016 where the claimant scored 80.83 marks and the board of the respondent unanimously agreed to renew the claimant's employment contract for the next three years, and the following notable achievements of the claimant were noted:
  - a. The organization was more and more living within its means.
  - b. There was marked reductions of deficits and debts carried over time.
8. The renewal of contract was confirmed by the respondent to the claimant's bankers vide a letter dated 06.12.2016 wherein the respondent confirmed that the claimant's gross pay stood at Kshs.608,193 and the letter confirmed further as follows:

“We further confirm that there is no disciplinary case current or pending against this employee, nor is she under notice to resign. Undugu's retirement age is 60 years so Ms. Ogutu has 7 years to retire”
9. The claimant states that she had legitimate expectation that the contract would subsist in the first instance, until expiry in the year 2019 if she performed well as per the periodic performance evaluation to be carried out as per the contract and if found acceptable, to have her contract renewed further, upon her application, for a further period of 3 years all the way to retirement.
10. The claimant states that based on the respondent's assurances and undertakings, and on the strength of her total gross income, she applied and was granted by her bank a substantive amount of loan, which was to be paid out of her seven years' total gross employment emoluments.
11. Three months into the renewal of her contract the respondent's board in March 2017 began coercing the claimant to resign on the pretext that the respondent had financial constraints and the pressure weighed on the claimant on a day to day basis.
12. On 06.07.2017 the board of the respondent held a meeting initially in the absence of the claimant and made the following unilateral resolutions:
  - a. That the claimant was expensive and cannot be sustained and the respondent strive to get a leadership at a cheaper cost.
  - b. That the option was to downgrade the top structure and make Assistant Director of Programmes to double as the programme director and also the team leader of the organization.



- c. That the board of the respondent came to a conclusion that removing the claimant in the subjective opinion of the board of the respondent, would stabilize the relationship between the respondent and the donors.
  - d. That the board of the respondent concluded that the appropriate time to separate with the claimant was to be done immediately not now on grounds of redundancy but incompetence.
  - e. The board again clarified that the issue of incompetence cannot be sustained and instead opted for a negotiated separation.
  - f. The board of the respondent mandated one Mr. Adhola to specifically “guide the management of a ‘smooth transition’ and declare to the claimant the decision of her exit in a dignified manner.
  - g. The board of the respondent decided to demand the resignation of the claimant and to base the decision solely on the issue of ‘withheld donor funding’.
  - h. The board again made a decision not to proceed with an acrimonious separation.
13. The claimant was then invited into the meeting and was asked to decide between the two options;
- a. that she be charged and defend herself to the satisfaction of a panel to be set up on allegations that were not brought to her attention; or,
  - b. mutually agreed but dignified exit.
14. The claimant states that she was forced to agree to a ‘mutually agreed and dignified exit’ clearly subject to a discussion and agreement on the terms of the disengagement.
15. The respondent’s board proceeded to direct the formation of a smaller committee of the Executive board to agree on the final details of the agreement, get donor buy in for the proposed elements and the claimant was clear from the onset that she required payment of the entire unserved period to which statement, was never objected by the board of the respondent even after they had proceeded in camera to further deliberate on the matter.
16. The claimant states that the responsibility of formulating and executing a mutual agreement and dignified exit lay with the respondent.
17. That the chairman of the board of the respondent on 11.07.2017 wrote to some donors of the respondent and stated,

“2) Concrete steps to reduce costs

The board has decided on a three-phase strategy to address some of the challenges the organization is facing.

- a. Phase 1 Down grading the current management structure of Undugu Society of Kenya. To this end the board has in principle agreed with the current CEO, that she should leave the organization. She has already agreed to discuss early next week an agreeable exit strategy that will include discussion around the remaining contract, smooth handover of her duties and organization assets in her possession.”



18. The claimant states that even though she was briefly summoned into the meeting of 06.07.2017 and coerced to choose between two prepared options by the board of the respondent, she was completely excluded from the entire proceedings and the board of the respondent ensured that she did not have sight of the minutes of the meeting until the next board meeting of 27.07.2017.
19. The claimant states that the following passages were doctored and included into the minutes to create an impression that the board had resolved to terminate her contract on account of incompetence:

‘Mr. Adhola then took the board through the problem analysis for the CEO to understand the board decision. He enumerated the problem as follows:Leadership gaps.Poor management of donor relations.Inability to pre-empt the delay in renewing a concluded project and not fully appreciating the consequences of delay.The critical issue of inter project borrowing was not adequately communicated to the board and therefore catching the BOD unawares.The CEO should have taken ownership of the problems and sought solutions before forcing the hands of donors.Some key donors have lost trust in the CEO’s ability to remedy the current situation.The BOD noted that the CEO has not taken responsibility as to who failed the organization therefore not able to come up with corrective measures.In the circumstances the BOD is obliged to take the best course of action in this case requested the CEO for separation with Undugu.’
20. Towards the end of the respondent’s board meeting of 27.07.2017 the claimant was asked to leave the meeting briefly and on being called back to the meeting, was directed by the chairman of the respondent’s board to tender her resignation failure to which she would be dismissed by the board with immediate effect. The claimant states that she resisted the move and demanded an explanation for the abrupt move. The chairman insisted on an immediate handing over of a resignation letter. The board chair replied stating “I am being accused of delaying your departure. I am under pressure to demand your resignation. If you do not resign today you will receive our dismissal letter by midday tomorrow”
21. The claimant states that left with no alternative, she tendered her resignation on 28.07.2017 and demanded to be availed and paid the balance of the contract period as agreed and as part of the options availed to her in having a mutually agreed and dignified exit and to this end, she gave a 3-month notice of termination of the contract of employment to allow for the payment of the said sum to herself.
22. The respondent responded on 02.08.2017 accepting the notice and stating that her last day of work would be 31.07.2017 and there was no mention of the mutually agreed and dignified exit which was agreed option and also the payment of the balance of the contract sum and the letter did not deny her entitlement to payment of the balance of the contract sum.
23. The claimant took issue with the fact that the respondent denied her the opportunity to serve her notice period and prepare her colleagues for a smooth exit and handover.
24. The claimant pleaded that the respondent’s actions of coercing her to tender her resignation amounted to the respondent constructively terminating the claimant’s contract of employment.
25. The claimant states that the minutes of the meeting of 06.07.2017 was malicious and grossly libellous. That the minutes were published by the board of the respondent to her subordinates and the same has become a talking point within the NGO fraternity and public at large. That as a result the claimant has been shunned and avoided by right thinking members of the respondent and has caused the claimant a challenge in finding alternative employment in the NGO sector at all and anywhere else.
26. The claimant states that she is entitled to special yearly responsibility allowance or pension paid directly to her from community development international, the financial organization that keeps an



endowment fund for the respondent in the Netherlands for the period 2016,2017, 2018 and 2019 (based on a net Euro 3,982.5 per year): Exchange rate of Kshs.126

27. The claimant states that she is also entitled to the respondent's (Local employer's) pension contribution accrued for the remaining contract period that would have been held by the respondent's pensions manager at 15% of the respondent's pension contribution (between October 2017-December 2019) and based on her last basic salary of Kshs.300,000.
28. The claimant states that she is also entitled to the value of her official car which was taken away by the respondent, for reasons that it is an implied term of her contract and that all the contracts of previous executive directors of the respondent to keep the official cars and the official car she was utilizing was a Land Rover Discovery with an estimated value of Kshs.2,500,000.
29. On the part of the respondents it is argued that the organization was facing an acute decline in donor funding and had to lay off some of its members of staff and opted to reorganise its administrative structure to fit in its budget. The claimant was also a victim of the efforts to reduce the bulged staff causing a redundancy wave. Her salary had become very high and the organization could no longer afford to pay forcing it to opt for a separation. That the claimant's relationship with the donors had also deteriorated until most donors had pulled out which crippled the organisation.
30. That the claimant voluntarily resigned vide her letter dated 28.07.2017 and she was paid all her dues on exit even before the respondent had embarked on the process of terminating her employment either on grounds of redundancy or incompetence.
31. The respondent states that the renewal of the claimant's contract was not only limited to performance but also availability of funding since the organization is fully dependent on donor funding.
32. The respondent states that the claimant did not have a successful and extreme performance during the performance appraisal covering the period 01.01.2011 to 31.12.2013.
33. That the communication to the Barclays Bank limited was strictly meant to help the claimant to successfully apply for financing and the same did not necessarily reflect the true actual position of her employment since her contract was eligible to non-renewal and termination at any given time during the subsistence of her contract, and that by virtue of privity of contract, the respondent is not party to the contract between Barclays Bank and the claimant hence it has nothing to do with the claimant's liability towards Barclays bank as to the alleged loan.
34. The respondent states that the claimant never received a written performance warning letter, which was intentional, because the board considered her status in the organization and the negative effect such a warning letter would have had on her leadership role at the organization and decided not to.
35. The respondent states that the board resolutions of 06.07.2017 were made in the presence of the claimant, and that what was agreed on and resolved in the said board meetings was in principle that it was the appropriate time for the board to separate with the claimant who was then the CEO of the organisation since her performance was wanting and mainly because the organization could no longer afford her services due to lack and or decline in the funding of the organization.
36. That it was the board's decision to give the claimant a notice of termination of employment on grounds of redundancy and not to terminate her employment on grounds of incompetence at which point the claimant opted to resign and requested for 'soft landing' of which the respondent's board considered and paid her an equivalent of her three months gross salary less statutory deductions and also processed her pension dues.



37. The respondent states that there is no way the claimant would have been coerced to choose between the two allegedly prepared options of her exit by the board. That in fact the claimant made her own choice and decided to resign instead of pursuing and completing the discussions on a mutual agreement.
38. That the claimant being CEO of the respondent had access to all files and documents and the allegation that the board ensured that she did not have sight of the minutes of the meeting till the next meeting of 24.07.2017 is farfetched.
39. The respondent states that it was a typographical error that its letter was to be dated 02.08.2017 and that the claimant's last day in employment was 31.10.2017 being three months from 01.08.2017.
40. The respondent admits that it owes the claimant 33 leave days, but will pay the same on condition that the claimant pays Kshs.1350,000/= she owes the organization, which monies she took as salary advances.
41. The respondent maintains that the minutes of the meeting of 06.07.2017 are a true reflection of the proceedings of the board meeting, and if the minutes ever passed through the hands of the claimant's subordinates in her former office, then the same was in the course of duty of such employees.
42. The respondent states that the special yearly responsibility allowance or pension paid directly to the claimant from community development international has totally nothing to do with the respondent. That it was neither provided for in the claimant's contract of employment nor her payslip. It was an independent and separate arrangement between the claimant and CDI and the same was usually paid directly to her by CDI in contravention of her employment contract since it amounted to double employment.
43. That the claimant having resigned on 31.10.2017 she is not eligible for any pension for the period there after she left employment.
44. That the claim for the official car lacks merit, since it is not provided for in the employment contract and the said car was the property of the organization but allocated to the claimant's office to be used in the organization's work.
45. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
46. To answer the 1<sup>st</sup> issue, the parties were in a contract of service as pleaded and upon terms and conditions of remuneration that are documented and not in dispute.
47. To answer the 2<sup>nd</sup> issue, the Court returns that the contract of service was terminated by the claimant's notice of termination of employment contract with the respondent dated 28.07.2017. The letter was addressed to the Chairman of the respondent's Board of Directors. She stated that following a mutual agreement that she should leave the respondent organisation to reduce the burden on the administrative budget, the letter served as three-months' notice of her departure from the respondent with the last day at work being 31.10.2017 and further stated,

“With this notice, my last day will be on 31.10.2017. Given the circumstances under which I am leaving, I am also requesting the Board to consider according me the financial soft landing that was mutually discussed during my meeting with you and Mr. Okeyo last Friday, 21<sup>st</sup> July 2017, and as captured in the minutes of the Board meeting held on 6<sup>th</sup> July 2017. You will recall that I had requested to be paid a lumpsum amount equivalent to what I would have earned over the remaining period of my existing contract, a figure of roughly 10,000,000/- (ten million shillings), and that you undertook to contact CDI for support to



enable you accord me this request. This is a humble request to enable me cover my financial obligations while I look for another opportunity, particularly in view of the fact that we're approaching the national elections and it will be difficult for me to find another job at this time. Moreover, there will be the question by a prospective employer as to why I stopped working less than halfway through my just renewed three-year contract- with USK. I hope this request will still be considered as discussed.

Yours sincerely,

Signed

Celina Atieno Ogutu”

48. The respondent by letter dated 02.08.2017 acknowledged the claimant's letter of resignation of 28.07.2017. The respondent accepted the resignation with effect from 01.08.2017 with the last day at work being 31.07.2017. The finance department was asked to prepare the final dues including 2 months' salary to the end of the claimant's notice period being 30.09.2017; all pending leave days to 30.09.2017; terminal pension benefits per the RBA Act; and ex-gratia amount equivalent one-month basic salary. The letter asked the claimant to handover and to clear any debts owed the respondent to expedite the payment of final dues. The letter was signed by Wilfred Onono, Chairman of the Board of Directors. The claimant appears not to have signed the letter in acceptance of the terms of her notice to terminate the contract of service. The respondent's witness (RW) Charles Achola Adhola the Board Chairman, testified that the letter was in error to state that her last day at work would be 31.07.2017 as the correct date was 31.10.2017 as the error was typographical. RW further testified that the letter had not been recalled to correct that error.
49. Taking into account the material on record and the testimonies, the Court returns that the contract of service ended by mutual agreement but what was in dispute was the terms of the separation. The agreement to separate is manifested in the claimant's letter of notice to terminate the contract and the respondent's acknowledgement and conditional acceptance of that claimant's notice. While testifying that she was forced to resign by issuing the letter on notice to terminate the contract, the Court returns that the claimant has not provided material evidence to confirm force or coercion to terminate the contract. The Court returns that the termination was voluntary and mutually agreed upon. The termination was not constructive as alleged for the claimant. The minutes exhibited by the claimant show that at the meeting held on 06.07.2017 parties agreed to separate but what was not determined and agreed upon were the terminal or separation dues payable to the claimant. Allegations of unfair constructive termination will fail as the claimant has not established a fundamental breach of the contract of service by the respondent or a situation attributable to the respondent that may have made the claimant unable to continue working and therefore consider herself terminated. Having voluntarily given a notice to terminate, the Court considers that once it was accepted, the same amounted to a meeting of the parties' mind to terminate the contract. Thus, while the terms of that separation about the claimant's final dues were in dispute, the termination was mutually agreed upon and the Court returns that it was not unfair or unlawful as urged for the claimant.
50. The 3<sup>rd</sup> issue is whether the claimant is entitled to the remedies as claimed and prayed for. The Court returns as follows:
  - a. The claimant for Kshs.16, 421, 211.00 gross pay for unexpired contractual period of October 2017 to December 2019 is not justified. It is submitted that the amount is due consequential to the alleged unfair termination. The Court has found that unfair termination was not established at all. Even if the unfair termination had been shown, a claim for lost future earnings like the present one would not be valid unless the claimant shows that for one or other reason



attributable to the respondent, the claimant's capacity to gainfully engage after termination was thereby diminished completely. That is not the case in the instant dispute. The claimant appears to have been at liberty and with capacity to get gainfully engaged after the termination.

- b. Special yearly responsibility allowance or pension is not due. The claimant by herself and as acknowledged by the respondent confirms that the allowance was directly paid to her by CDI and it was not part of the contract of service. It will collapse as not due from the respondent. It appears to have been a fridge benefit, not contractual, and attaching if she continued in employment. It is not shown to be payable by the respondent.
- c. 33 annual leave days are not in dispute and are awarded at Kshs.669, 012.00 as prayed for. RW confirmed in his testimony that the days were outstanding in leave but payment had been withheld since the claimant owed Kshs.1,000,000.
- d. Local pension contribution for unexpired contractual period of 27 months Kshs.1,215,000.00 is found unjustifiable as is not due for the period actually not served. The Court finds that it was not based on the contract and it is declined. Once the contract terminated, unless agreed by parties of provided in the contract, the benefits flowing from the contract such as contributory pension became cut forthwith.
- e. The car appears to have been for official use by the claimant for so long as the claimant remained CEO. It is said that there was a practice that the out-going CEO goes with the official car but the practice was not established and further, the claim and prayer is not to be given the car but it is for payment of Kshs.2, 500, 000 said to be the value of the car. As urged for the respondent, the prayer will fail as not based on the contract of service.
- f. Similarly, three-years' post service medical cover is not based on contract and is declined.
- g. The claimant is entitled to the certificate of service per section 51 of the Employment Act, 2007.
- h. The Court returns that the alleged defamation and attached claim for damages is not established. As urged for the respondent, the minutes in issue mentioning the claimant were prepared by relevant respondent's staff in their ordinary course of duty. Such staff were part of the respondent as employees or agents and the Court finds that the requirement to publish to a third party was not established at all. Further, the deliberations appear not to have been shown to have been defamatory as the Board was exercising its prerogative as an employer to deliberate about the claimant as an employee and nothing stopped the board from considering even adverse matters as may have arisen. In absence of any other material, the Court returns that defamation is not established at all. General and exemplary damages were prayed for on account of the alleged defamation and the same are similarly declined as unjustified.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. Payment of Kshs.669, 012.00 by 31.12.2023 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.
- b. The respondent to deliver the certificate of service within 30-days.
- c. The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 20<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

